

From: Klein, Larry <larry_klein@greenbrier.com>
Sent: Tuesday, January 1, 2019 12:13 PM
To: Kelly Banton <kelly.banton@greenbriercounty.net>
Cc: 'Carrie J. Cecil' <CCecil@spilmanlaw.com>; Adam Long <adam_long@greenbrier.com>
Subject: Proposed agenda item for Jan. 8th meeting

Kelly,

I had a brief conversation with Lowell and we will be sending a draft of a request for a contract exemption for proposed TIF projects to be reviewed by the commissioners and counsel on Wednesday or Thursday. I would like to address the commission at the meeting on Jan. 8th and ask you to add this to the agenda. Below is proposed verbiage for the agenda item. Please let me know if you have any questions.

Consider submission of contract exemption request to WV Ethics Commission for proposed Tax Increment Financing Project Plan for Greenbrier County TIF District No.1 with The Greenbrier Sporting Club Development Company, Inc and The City of White Sulphur Springs

Thanks,

Larry Klein
Vice President and General Manager
<https://url.emailprotection.link/?aHQeggMFvoBM9ZfHawbVnZw4Gx0kiEJsCZKFtk9SuWOI~> / 304-647-6100 One Sporting Club Drive White Sulphur Springs, WV 24986

[LETTERHEAD OF GREENBRIER COUNTY COMMISSION]

January ___, 2019

Via United States Mail

Rebecca Stepto
Executive Director
West Virginia Ethics Commission
210 Brooks Street, Suite 300
Charleston, West Virginia 25301

RE: Request for Contract Exemption Regarding Proposed New
Tax Increment Financing Project Plan For
Greenbrier County TIF District No. 1 (White Sulphur Springs)

Dear Director Stepto:

On behalf of The County Commission of Greenbrier County (the “County Commission”), and based on the facts and circumstances described in detail below, please accept this request for a contract exemption from the applicable provisions of the West Virginia Governmental Ethics Act, Article 2, Chapter 6B of the Code of West Virginia, 1931, as amended (the “Ethics Act”). This contract exemption would permit the County Commission to enter into a contract with one or more of the following companies: (i) The Greenbrier Sporting Club Development Company, Inc. (the “Development Company”); (ii) The Greenbrier Resort (the “Greenbrier Resort”); and (iii) The Greenbrier Sporting Club, Inc. (the “Sporting Club” and collectively with the Development Company and the Greenbrier Resort, the “Greenbrier Companies”) to carry out the development of all or a portion of the TIF Projects, as defined below. Moreover, the Development Company plans to submit a new Tax Increment Financing Application requesting the approval of a new project plan that will greatly benefit the people of Greenbrier County and the Greenbrier Companies and I respectfully request that this contract exemption also authorize the Executive Director of the West Virginia Development Office to approve the new project plan as provided for in the West Virginia Tax Increment Financing Act, Article 11B, Chapter 7 of the Code of West Virginia, 1931, as amended (the “TIF Act”).

The West Virginia Tax Increment Financing Act

By way of background, the TIF Act permits the capture of 100% of the increases in ad valorem property tax revenue gained by developing a discrete geographic area and the use of such revenue to finance development or redevelopment projects. Section 8 of the TIF Act sets forth the requirements for a development or redevelopment district project plan, which include a cost-benefit analysis showing the economic impact of the project plan on each levying body and the impact on the economy if the project plan is not completed. The basic intent of tax increment financing is to leverage future increases in tax revenue to fund current projects with the result being a higher property tax revenues to the levying bodies after development or redevelopment district is terminated. No development or redevelopment district may be in existence for more than 30 years as provided in Section 10 of the TIF Act.

The TIF District

In accordance with the TIF Act, the County Commission (i) created a development district that includes substantially all of the White Sulphur Magisterial District and is known as the “Greenbrier County

TIF District No. 1 (White Sulphur Springs) (the “TIF District”) and (ii) approved a project plan for the TIF District entitled “White Sulphur Springs TIF District Project # 1” (the “Original Project Plan”). The Original Project Plan included the construction and equipping of improvements to the wastewater treatment plant for the City of White Sulphur Springs (the “City”) and all necessary appurtenances (the “Original TIF Projects”). The County Commission financed the costs of constructing and equipping the Original TIF Projects through the issuance of tax increment revenue bonds.

The two largest taxpayers in the TIF District are the Greenbrier Resort and the Sporting Club. As noted in the County Commission’s Official Statement dated December 17, 2013 and prepared in connection with the issuance of tax increment revenue refunding bonds by the County Commission, the primary economic engine within the TIF District is the development and related tax increment revenues generated by the Sporting Club. Although the tax increment revenues generated by the Sporting Club funded the Original TIF Projects, the Greenbrier Companies have not received any direct benefit from the TIF District to date. The Original TIF Projects would not have been possible but for the development of The Greenbrier Sporting Club. In addition to funding these projects, more than 300 new jobs were created to run the Sporting Club, build homes, and service the membership.

As described below, the Development Company and other Greenbrier Companies are planning additional development in Greenbrier County that will not occur without the ability to utilize funding from tax increment revenues. If such development does not occur, the County Commission and the other levying bodies will not realize the increase in property taxes resulting from the planned development after the TIF District terminates, which at its latest would be December 14, 2034. In addition to the loss of future property taxes, an estimated 92 permanent and 20 temporary jobs will not be created if the projects do not move forward.

The Proposed TIF Projects

Infrastructure for Valley Floor Development

Following the devastating flood which occurred in Greenbrier County in the summer of 2016, new valley floor land became available for development. Design work, which is being funded from private sources, is currently under way for planned improvements on this site. The Development Company currently anticipates requesting that the County Commission issue tax increment revenue bonds to fund \$3.5M in site preparation, \$3.5M in road improvements and utility extensions, and \$1.5M in water system improvements related to the planned valley floor development. In addition to the improvements that would be funded by tax increment revenue bonds, it is anticipated that over \$100M of vertical development funded through private sources will take place on the site.

Site Work and Infrastructure for Replacement Laundry Facility

The Greenbrier Resort’s laundry facility was removed during the construction of the new Center Court at Creekside tennis stadium. Since that time, laundry has been trucked to Virginia, processed and returned to the Greenbrier Resort. Establishing a new laundry facility on the property is anticipated to create approximately 27 new jobs. The cost of this facility is \$5M, and the site is shovel-ready. The Development Company currently anticipates requesting that the County Commission issue tax increment revenue bonds to fund approximately \$1M of the site preparation, road improvements, and utility extensions which are needed in connection with this facility.

Kate’s Mountain Ski Area

For many years, the Greenbrier Companies have been considering a ski area on Kate’s Mountain. In 2013, the family of Governor Jim Justice purchased over 3,000 acres of Kate’s Mountain for over \$10

million as a first step toward this project. The Justice family retained SE Group, the top ski-mountain design firm in the United States, to design a ski mountain that would include lifts, a fully automated snow-making system, approximately 240 acres of terrain (20% greater than the size of Snowshoe), a base lodge and on-mountain restaurants. To make this project possible, improvements to, or replacement of, the bridge over the railroad tracks at the entrance to Kate's Mountain Road, as well as improvements to the intersection, will be required. In addition, The Greenbrier Gun Club would also need to be relocated. This ski area would also contain a residential component (single-family homes and condominiums) that will greatly benefit the area in the wintertime, in addition to increasing the tax base and bed tax revenue. The total cost of this ski area is in excess of \$100 million and is anticipated to be built in phases. The Greenbrier Companies are requesting the utilization of approximately \$500k or more of the remaining available proceeds of tax increment revenue bonds requested to be issued by the County Commission or "pay as you go" funds from the TIF District to finance start-up costs for the ski area (roads, bridges, utilities, etc.).

Other Proposed TIF Projects

The Development Company and the City are planning to submit a Tax Increment Financing Application proposing a new project plan for the TIF District (the "New Project Plan") to the County Commission. In addition to the projects described above (collectively, the "TIF Projects"), the New Project Plan would propose funding approximately \$1.5M of repairs to water lines in the City's waterworks system and approximately \$3.0M of sewer line extensions to connect the town of Caldwell to the City's wastewater treatment plant. The City currently loses more than 60% of its treated water through leaks. Repairing these leaks would allow for more service and be better for the environment. Caldwell currently does not have a connection to the wastewater treatment plant. This is an environmental issue and a deterrent to development in this area. The connection to Caldwell to the wastewater plant would great benefit those residents and all who use the Greenbrier River for recreation. The New Project Plan would require the approval of the County Commission and the Executive Director of the West Virginia Development Office (the "Executive Director") as provided in the TIF Act.

Requested Contract Exemption

The relevant law under the Ethics Act governing this request is as follows:

W.Va. Code §6B-2-5(d)(1) states, in relevant part:

[N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control ...

W.Va. CSR §158-8-4 states, in relevant part:

Public officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

W.Va. Code §6B-2-5(d)(2) states, in relevant part:

In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a

public contract when such a person has a limited interest as an owner, shareholder, or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

- (A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in one calendar year;
- (B) An interest as a creditor of a public employee or official who exercises control over a contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.

W.Va. Code §6B-2-5(d)(3) states, in relevant part:

If a public official or employee has an interest in the profits or benefits of a public contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest ...

W.Va. Code §6B-2-5(d)(4) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

As the members of the Ethics Commission are no doubt aware, Governor Jim Justice or members of his immediate family own, either individually or through ownership interests in various other entities, or have a controlling interest in the Greenbrier Companies. Additionally, some of the proposed projects described above would be constructed on properties which are owned by certain of the Greenbrier Companies and such properties and the Greenbrier Companies which own such properties would stand to benefit from the construction of such TIF Projects on the properties. Under the TIF Act, the Executive Director of the West Virginia Development Office (the “WVDO”) is responsible for approving or disapproving the New Project Plan if the same is submitted by the County Commission to the Executive Director for consideration. As the Chief Executive of the State of West Virginia, Governor Justice appoints the Executive Director and he serves at the Governor’s will and pleasure. Furthermore, the Cabinet Secretary of the Department of Commerce under which the WVDO is constituted and organized is appointed by and serves at the will and pleasure of the Governor. The Ethics Commission has previously found that the Governor has sufficient control over the public contracts approved by the WVDO as they relate to The Greenbrier Resort for purposes of W.Va. Code §6B-2-5(d)(1).¹

There is little debate, therefore, that absent an exemption from the Ethics Commission the County Commission could not enter into a contract that would otherwise be prohibited by W.Va. Code §6B-2-5(d)(1) with the Greenbrier Companies. In this case, the Ethics Commission should grant the County Commission an exemption from the contract prohibition because such prohibition would result in undue hardship and substantial interference with the economic development efforts already underway and overseen by the County Commission. The real winners from approval of the contract exemption are the

¹ Contract Exemption 2017-04, issued by the Ethics Commission on August 18, 2017.

residents of Greenbrier County which will benefit from a significant increase in jobs and net tax revenue that will result from and depend solely on implementation of the New Project Plan.

The implementation of the New Project Plan will not occur if the County Commission is prohibited from entering into a contract with the Greenbrier Companies. Furthermore, if such development does not occur, the County Commission and the other levying bodies will not realize the increase in property taxes resulting from the planned development after the TIF District terminates, which at its latest would be December 14, 2034. In addition to the loss of future property taxes, an estimated 92 permanent and 20 temporary jobs will not be created if the New Project Plan does not move forward.

For all of the foregoing reasons, and those apparent to the Ethics Commission, I respectfully request a contract exemption that permits the Executive Director to approve the New Project Plan for the TIF District if and when it is submitted by the County Commission for approval by WVDO. This subsequent approval will allow the County Commission to issue additional tax increment revenue bonds to finance the New Project Plan described herein.

I further request that this contract exemption expressly permit the County Commission to enter into a Development Agreement or other contract with one or more of the Greenbrier Companies to carry out the development of all or a portion of the TIF Projects. Typically, a development agreement is entered into between the county commission or municipality that created the development or redevelopment district and the private developer involved in the particular project to set forth provisions related to competitive bidding of construction contracts under the TIF Act, obligating the private party to complete the project in the event of costs exceeding the available tax increment funds and procedures for oversight by the public party of expenditures to be paid from tax increment funds. The County Commission anticipates that if it enters into a Development Agreement with one or more of the Greenbrier Companies, it would be consistent with similar projects found elsewhere in West Virginia. This contract exemption is just the first step towards implementation of additional economic development and diversification efforts throughout Greenbrier County and the surrounding tri-county region. Without approval of this request, these efforts will cease and the corresponding hardships on those who depend on the jobs, income, and revenue from these projects will be left to seek employment and tourism opportunities elsewhere.

On behalf of the entire County Commission, I appreciate your prompt consideration of this request. Please contact me if you require any additional information as the Ethics Commission considers this contract exemption.

Sincerely,

THE COUNTY COMMISSION OF GREENBRIER
COUNTY

By its President